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**Hotel Employees and Restaurant Employees, Local 2
and Castagnola, Inc. of San Francisco d/b/a
Castagnola's Restaurant.** Case 20-CB-11531

September 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

On July 11, 2002, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent Union filed exceptions and a supporting brief and the General Counsel filed cross-exceptions and a brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

We agree with the judge's conclusion that the Union did not unlawfully refuse to bargain with the Employer. As the judge found, Employer Attorney Mark Montobbio summarily rejected all of the Union's proposals, and stated that he had no counterproposals and that the Employer did not want to change anything. The Union accepted the Employer's bargaining position, as expressed by Montobbio, that it wanted no changes to the existing contract. Clearly, such acceptance was not an act of bad faith. Montobbio's subsequent letters to the Union left it to the Union to inform the Employer if it wished to continue bargaining. The Union, having accepted the Employer's bargaining position, saw no need to respond.¹ In these circumstances, we find that the Union did not act unlawfully in failing to resume negotiations.²

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. September 30, 2003

¹ We do not rely on the judge's finding that the Employer required, as a condition precedent for resuming bargaining, that the Union advise the Employer in writing of its desire to do so.

² We find it unnecessary to pass on the judge's finding that the Union's assertion of a contract was mistaken, or his speculation as to how the General Counsel might have handled a union charge that the Employer refused to execute the parties' agreement, because these findings are not necessary for the resolution of the unfair labor practice alleged in the complaint. For the same reason, although we adopt the judge's findings as to the Employer's conduct with respect to bargaining, we find it unnecessary to pass on his suggestion that the Employer's actions constituted bad-faith bargaining.

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Lucile Lannan Rosen, Esq., for the General Counsel.
Kim C. Wirshing, Esq., of San Francisco, California, for the Respondent.
J. Mark Montobbio, Esq., of San Rafael, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The unfair labor practice charge in the above-captioned matter was filed by Castagnola, Inc. of San Francisco, d/b/a Castagnola's Restaurant (the Charging Party) on June 14, 2001.¹ After an investigation, based upon the above unfair labor practice charge, on August 20, the Acting Regional Director for Region 20 of the National Labor Relations Board (the Board) issued a complaint, alleging that Hotel Employees and Restaurant Employees, Local 2 (Respondent), engaged in, and is continuing to engage in, an unfair labor practice within the meaning of Section 8(b)(3) of the National Labor Relations Act. Respondent timely filed an answer, essentially denying the commission of the alleged unfair labor practice. Pursuant to a notice of hearing, a trial on the merits of the alleged unfair labor practice was held before me on November 29 in San Francisco, California. During the trial, all parties were afforded the right to examine and to cross-examine witnesses, to offer into the record all relevant documentary evidence, to argue their legal positions orally, and to file posthearing briefs. The latter documents were filed by counsel for the General Counsel and by counsel for Respondent, and both briefs have been carefully considered by me. Accordingly, based on the entire record, including my observation of the testimonial demeanor of each witness and the post-hearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent, a corporation, with an office and place of business on Fisherman's Wharf in San Francisco, California, has been engaged in the operation of a restaurant. During the year ending on December 31, 2000, in conducting its business operations described above, the Charging

¹ Unless otherwise stated, all events occurred during 2001.

Party derived gross revenues in excess of \$500,000 and received goods and products valued in excess of \$5000 directly from suppliers located outside the State of California. Based on the foregoing, the Charging Party has been, and is now, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act,

II. LABOR ORGANIZATION

Respondent is now, and has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

The General Counsel alleges that, notwithstanding the Charging Party's requests that Respondent meet and bargain with it for a successor collective-bargaining agreement, the former has steadfastly failed and refused to do so and thereby engaged in conduct violative of Section 8(b)(3) of the Act. Contrary to the General Counsel, Respondent argues that the parties reached agreement on a successor collective-bargaining agreement when Respondent surprised the Charging Party by accepting its offer for a new agreement and that, as the Charging Party had no intent in reaching agreement for a new contract with Respondent, no violation of the Act may be found.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Pursuant to a lease agreement with the city of San Francisco, the Charging Party, a corporation, owns and operates a restaurant on Fisherman's Wharf, which is a land and wharf area, adjacent to San Francisco Bay, owned by the city, and, although the record is silent as to his ownership interest in the corporation or his corporate title, if any, there is no dispute that the operator of the restaurant is Andrew Lolli. The record establishes that since at least May 1, 1970, the date on which the lease agreement between the Charging Party and the city of San Francisco commenced, Respondent and the Charging Party have had a collective-bargaining relationship; that the relationship has resulted in successive collective-bargaining agreements, the most recent of which expired, by its terms, on April 30, 2000; and that Respondent is the bargaining representative of all the Charging Party's employees performing work covered by the terms of the successive contracts. J. Mark Montobbio is the Charging Party's attorney for labor relations matters and Hector J. Reinaldo, an attorney, is an "advisor" to Lolli on business matters. Michael Casey is Respondent's president and Lamoin Werlein-Jaen is its vice president and a field representative. The record further establishes that on expiration of the parties' most recent collective-bargaining agreement Respondent made no request that the Charging Party enter into negotiations for a successor agreement, and the latter just continued the terms and conditions of employment of the expired agreement.

The genesis of the instant labor dispute was Lolli's desire, resulting from his advanced age and fragile medical condition, to sell the restaurant. According to Attorney Montobbio, in December 2000, rumors concerning a possible sale of the restaurant by Lolli, began appearing in newspaper articles. At approximately this time, one of Respondent's representatives,

Alphonso Pines, telephoned him and asked whether he knew anything about the sale of the business. Montobbio denied such knowledge but "promised" he would return Pines' call. Shortly thereafter, Montobbio met with Reinaldo, who informed Montobbio that, in fact, Lolli was trying to sell the business and that he was assisting Lolli in negotiating with a prospective purchaser. The two attorneys agreed that Montobbio should immediately notify Respondent of the pending sale of the restaurant and of the identity of the buyer. Thereafter, in January, Montobbio wrote to Respondent, informing it of the sale and disclosed the prospective purchaser's identity. Casey also was aware of rumors of the possible sale of the business in December 2000, and receipt of Montobbio's letter confirmed for him that the rumors were factual. Subsequently, according to Montobbio and Casey, in either January or February, they met at the World Trade Club² in San Francisco. According to Montobbio, Casey "indicated that he wanted Castagnola's to guarantee that whoever purchased the restaurant would hire all of the former employees and sign an agreement with [Respondent]." Montobbio replied that the purchaser had already informed Lolli that recognition of Respondent "would depend upon what happened after they purchased the business" and that "we couldn't guarantee one way or the other what would happen."³ Montobbio added that he was prepared to discuss severance pay for the affected restaurant employees. Casey's recollection was similar—that, after he raised such issues as the "extension of benefits" and the "retention of the workers and their jobs," Montobbio informed Respondent's president that the Charging Party was prepared to offer a "handsome" severance package to the restaurant's employees. After meeting with Montobbio, Casey telephoned the owner of the prospective buyer and was informed that the buyer "had no intention" of either hiring the restaurant's employees or agreeing to operate under a union contract.⁴

The Charging Party's lease agreement with the city of San Francisco provides that an entity, known as the San Francisco Port Commission (SFPC), must approve the transfer of its lease to another entity, and, without the approval of the SFPC, the Charging Party could not consummate the sale of its restaurant to the potential buyer.⁵ The SFPC holds monthly public meet-

² Montobbio and Casey were well acquainted with each other, having negotiated collective-bargaining agreements for, at least, four properties, including Castagnola's.

³ During cross-examination, Montobbio stated that he was well aware of the position of the prospective buyer—"they said they wanted Castagnola's to resolve whatever differences they had with the Union because . . . they didn't want to buy a restaurant and have a problem when they opened up."

⁴ Hector Reinaldo confirmed that this was the prospective buyer's position. According to Reinaldo, the former told Lolli that he was not interested in becoming involved in any labor problems, and Lolli replied that he did not have an existing union contract. Reinaldo had a followup conversation with the buyer, explaining that there was an expired collective-bargaining agreement but no severance package. The prospective buyer responded that those were all the Charging Party's problems.

⁵ According to Montobbio, there would be no close of escrow until the SFPC approved the transfer of the lease to the prospective purchaser.

ings, and, commencing in late 2000 and continuing through the first 4 months of 2001, Reinaldo, Montobbio, and Lolli regularly appeared at the meetings, attempting to convince the SFPC to approve the transfer of the lease to the potential owner. Also, at said meetings, aware of the potential owner's opposition to any bargaining relationship with it, representatives of the Union voiced their opposition to the approval of the transfer of the lease. According to Casey, in opposing the sale of the restaurant, Respondent's strategy was to inform the residents of San Francisco and the SFPC that, by dint of agreement between the Charging Party and the potential buyer "workers were being thrown out on the streets" and that Respondent required a "successorship agreement" from the Charging Party as an express condition of any new collective-bargaining agreement. As of the date of the instant hearing, the SFPC had yet to approve the transfer of the lease. In this regard, according to Montobbio, "[Respondent] has political power in San Francisco and was successful in getting the SFPC to delay action."

Concomitant with their appearances before the SFPC, Montobbio and Casey engaged in bargaining over the Charging Party's proposed severance package for the restaurant's bargaining unit employees.⁶ One such meeting was held on April 5.⁷ There is no dispute that this meeting was largely devoted to discussion of the Charging Party's severance proposal, which Montobbio increased to approximately \$400,000 and to which Respondent presented a counterproposal.⁸ Also, at some point during the meeting, Casey gave Montobbio Respondent's proposals for a successor collective-bargaining agreement, General Counsel's Exhibit 3.⁹ While promising to examine the contract proposals, Montobbio refused to discuss them at that meeting. Subsequently, according to Montobbio, "I received a call from

Mike Casey asking me if we would sit down and meet to negotiate a new collective-bargaining agreement since now the restaurant had reopened." Montobbio replied, asking "why waste our time" since the owner was trying to sell the restaurant, but, after Casey said Respondent had the right to request contract bargaining, Montobbio agreed that Casey was legally accurate. The two men then agreed to meet on May 18. Asked if the purpose of this meeting was to discuss a successor agreement, Montobbio cryptically replied, "Well, my intention, you know, Mike asked for the meeting was to discuss everything. The severance . . . that was number one and our priority."

There is, of course, no dispute that the parties met on May 18 at Respondent's office and that they devoted almost the entire meeting to a discussion of Respondent's successor contract proposals. Present for the Charging Party¹⁰ were Montobbio and Reinaldo,¹¹ and representing Respondent were Casey, Werlein-Jaen, and approximately 15 of the restaurant's employees. Montobbio testified that the bargaining session, which lasted for just an hour, commenced with Casey distributing copies of Respondent's contract proposals and saying that they wanted to spend the time negotiating the provisions. Montobbio responded that he would go through the proposals and, rather than asking any questions, he began stating his position as to each proposal. The first proposal was Respondent's demand for a 5-year contract term. According to Montobbio, "I told Mike that Castagnola's would not accept the five-year agreement" and, as there was a pending sale, "that I had no proposal at that time . . . and . . . would . . . discuss the term later on." Regarding the next proposal, health and welfare, Montobbio asked for the current cost of the parties' agreement. Casey said he did not know the exact figures, and Montobbio asked him to have the cost figures available before the next meeting.¹² The next proposal concerned employee vacations, and "I told them we weren't interested in that and that . . . we weren't prepared to agree to more vacation that we had in the expired agreement." As to Respondent's proposal on part-time employees, which involved eliminating the contract language, which gave the Charging Party "some relief" in hiring employees, Montobbio said "the restaurant wasn't willing to agree to eliminate that language from any contract." Next, responding to Respondent's proposal adding some paid holidays and requiring the Charging Party to pay holiday pay whether or not employees work on a listed holiday, Montobbio "rejected that . . . we weren't interested in increasing any holidays over what we were presently

⁶ During February and March, Montobbio met with Casey on at least two occasions regarding the Charging Party's proposed severance package for the restaurant's employees and increased the offer from a total package of \$250,000 to \$390,000 to be divided amongst the employees according to length of service at Castagnola's.

⁷ On March 1, Lolli closed the restaurant ostensibly because his health was failing but actually, according to Montobbio, as a tactic to pressure the SFPC to finally approve the sale. However, "the Port took the position that if the restaurant did not . . . resume its operations it could void the lease. And [as] the lease is the value of Mr. Lolli's investment . . . he basically was forced to reopen, and he did so . . . in April." In doing so, the Charging Party did not reinstate all of its employees in accordance with their seniority and, as a result, Respondent filed a contractual grievance, alleging that 10 employees should have been offered re-employment upon the reopening of the restaurant.

⁸ Respondent proposed a severance package including \$1,500,000 to be divided amongst the employees, extended benefits for the length of any closure of the restaurant, and, the Charging Party's agreement to make rehiring the employees a condition of the sale.

⁹ Attached to GC Exh. 3 was a two-page "successorship addendum." The provision required the Charging Party, as a condition of any agreement to sell the restaurant, to ensure that any collective-bargaining agreement between the parties would be binding upon the buyer, who would be obligated to execute the collective-bargaining agreement. Further, if such a provision was not included in an agreement to sell the restaurant, the Charging Party would be required to pay to its employees the difference between the contractual wages, fringe benefits, and other monetary amounts and those amounts paid by the buyer for the length of the contract.

¹⁰ At this time, according to Montobbio, Lolli, who is over 90 years old, was in the hospital and seemingly near death. However, he rallied and recovered from his illness.

¹¹ Reinaldo confirmed Montobbio as to where the Charging Party's interest lay. Thus, when asked at the hearing whether he and Montobbio had discussed the Union's contract proposals prior to May 18, he replied, "Not the proposals. Basically, we talked of severance package." Montobbio contradicted Reinaldo on this point, stating, during cross-examination, he discussed bargaining with Reinaldo prior to the May 18 meeting—particularly health and welfare and the pension plan in order to make them more cost efficient.

¹² During cross-examination, Montobbio conceded he told Casey "that the company did not want to spend more than what it was currently paying."

paying.” On Respondent’s paid time off and extended sick leave proposals, Montobbio, who was familiar with the proposed language from other negotiations with Respondent, told Casey “we weren’t interested in agreeing to that” or to changing the existing contract language. In responding to the paid lunch period proposal, Montobbio “told [Casey] he knew we didn’t have the money. We weren’t prepared to agree to that. So we rejected that proposal.” Next, Respondent’s proposal on schedules modified the existing contract language, and “I explained that . . . the restaurant, given [it’s] financial situation, had to be flexible, had to be able to send people home if business was slow. And this would inhibit that.” Regarding the attached addendum on successorship, Montobbio said “we weren’t interested in their successorship addendum” and “that we had made a proposal to them for a severance agreement,” which would remain on the table until May 31. As to Respondent’s proposed language regarding a banquet gratuity, “I told them that at the time we weren’t interested in changing [the practice of how banquet gratuities were distributed between the employees who had worked a particular banquet].” As to Respondent’s proposed automatic gratuity for any parties of five or more patrons, Montobbio stated that he rejected the proposal but that he told Casey he might “come up with some kind of proposal.”¹³ Concerning the proposal on wages, which established increases in each year of the contract, Montobbio said “absolutely not” and that “we weren’t interested in increasing . . . our wage cost over what the restaurant was currently paying.” At this point, according to Montobbio, Casey asked for a listing of each current employee and his or her current wage rate. Montobbio agreed to provide this information at the parties’ next bargaining session. Regarding Respondent’s pension proposal, according to Montobbio, “we rejected their proposal.” Finally, as to Respondent’s proposal on bargaining unit positions, which was to restore individuals excluded in 1997, according to Montobbio, “I told [Casey] that . . . we weren’t interested in changing that.”¹⁴

Montobbio further testified that, when he finished going through Respondent’s proposals for a successor collective-bargaining agreement, he repeated an earlier statement concerning a May 31 deadline for Respondent to accept the Charging Party’s severance package proposal. Then, he and Casey began discussing the Union’s contractual grievance on the Charging Party’s failure to recall 10 employees after the restaurant recently resumed operations. Casey advised that Respondent would contest the grievances, and Montobbio replied that the Charging Party would process them through the second step but, as the prior contract had expired, it would not agree to binding arbitration. At this point, Respondent’s representatives caucused. When they returned, the meeting just ended and Montobbio and Reinaldo left the building. According to Montobbio no date had been set for the parties’ next bargaining

session, but he told Casey to “get back” to him as to when Respondent wanted another bargaining session. Finally, during direct examination, asked if there was any discussion regarding employer proposals, Montobbio replied, “No. I didn’t have any proposals at the time. I was just responding to their proposals. I would back to them with my proposals when we met the next time.” However, during cross-examination, he averred that Casey might specifically have asked if he had any counter-proposals, “and I told him I didn’t at that time.”

During cross-examination, Montobbio replied “Absolutely not” when asked if Respondent made a proposal that the expired agreement be rolled over for a period of time and specifically denied that he made such a proposal. However, he conceded responding to several of Respondent’s proposals with the words “leave as is.” Asked if he said anything to Casey which would have caused the latter to believe the Charging Party desired to roll over the expired contract terms, the attorney replied, “No” because “I said the areas we definitely rejected. I said the areas that . . . we prefer not to change. I said leave as is over some areas.”¹⁵ Asked if there is any difference between saying leave as is and actually agreeing to a contract with everything the same as in the previous contract, Montobbio replied, “Yes . . . I was responding to their proposals. And I was trying to give them a rationale for why we were rejecting . . . them . . . But when I make my counterproposals, I put together all of the things the employer would like to have with a view in mind that there are many things . . . that are going to remain the same.” He added that he left the meeting anticipating another meeting and understood there would be some trading of proposals done. Further, he denied leaving the meeting under any belief he just agreed to a new collective-bargaining agreement, for “any contract that we had was going to have [severance pay] language in it. . . . we’d never have an agreement if they didn’t agree to our [proposal] because we couldn’t sell the business.” Continuing, Montobbio stated that he never concluded a contract with Casey when, at the end, the parties failed to shake hands and agree they had a deal—“No, I don’t think I ever have with him or one of his other representatives. I think we’re always at the end, we got a deal. We got a deal.” Also, Montobbio conceded he did nothing regarding counter-proposals after the May 18 meeting as, in order to do so, he would have to bill his client, and Montobbio did not want to do so until a second bargaining session had been scheduled.¹⁶ Finally, Montobbio conceded there have been occasions during collective bargaining when he has placed a final offer before a union and had it accepted subsequent to the bargaining session.

Hector Reinaldo testified that he appeared at the May 18 meeting in order to assist Montobbio and that he possessed full

¹³ During cross-examination, asked why he would want to make a counterproposal on automatic gratuity, Montobbio replied that, before the Charging Party could make a decision on such a proposal, it “would have to make a decision of whether they would want to implement that kind of a practice. What impact that might have on customers.”

¹⁴ Montobbio’s bargaining notes show him saying “leave as is” to eight of Respondent’s proposals.

¹⁵ According to Montobbio the latter areas were vacations, holidays, paid time off, paid lunch, schedule change, banquet gratuities, pension, and bargaining unit.

¹⁶ While stating that his intent was to have counterproposals to make at the parties’ next bargaining session, Montobbio initially denied ever having met with company representatives to discuss what to offer to Respondent; however, he later testified “Oh, yeah, I had talked to the company about . . . what kind of proposals we might want to make if we get . . . the severance package.” Montobbio added that Reinaldo was the person to whom he spoke.

authority to approve any agreements reached by Montobbio.¹⁷ He further testified that Montobbio reiterated the Charging Party's previous severance package offer and said that he was giving Respondent until May 31 [to] accept. During cross-examination, asked if Montobbio had reached agreement on a new collective-bargaining agreement, would he have approved it, Reinaldo said, "No, because I wouldn't have given him permission to do it." According to Reinaldo, at the outset of the May 18 meeting, Montobbio told Casey he was "not" prepared to negotiate on a collective-bargaining agreement; rather, "we're here to talk to the severance package." But, Montobbio then said he would go through [Respondent's] proposals and "summarily rejected them entirely."¹⁸ Then, stating he would give Respondent a "reason" for rejecting each proposal, Montobbio "went through them one at a time." As to whether Montobbio might have agreed to a roll over of the expired collective-bargaining agreement's provisions, "I wouldn't have allowed him to do it while I was sitting there. Our intention was to get the severance package accepted. The buyers had already indicated that they would not close the escrow as long as there was an existing union contract."¹⁹ However, Reinaldo denied that the Charging Party would never have agreed to a collective-bargaining agreement with Respondent as Montobbio had been in communication with the prospective buyer's attorney in order to find "some middle ground" between them. Finally, contradicting Montobbio, asked if, at the end of the May 18 meeting, Montobbio said he did not have any counterproposals to make, Reinaldo replied, "No, he didn't say that," and, asked if he and Montobbio had discussed counterproposals, Reinaldo replied, "Yes, I had a discussion with him."²⁰

With regard to what occurred at the May 18 meeting with Montobbio and Reinaldo, Michael Casey testified that Montobbio began by announcing that the restaurant's severance proposal was "open" until May 31 and would be removed from "the table" on that date. Thereupon, the discussion turned to Respondent's contract proposals, with Montobbio responding to each one. According to Casey, as to the term of the successor agreement, the former said he did not want a 5-year term but had nothing "specific to offer then." Turning to health and welfare, for which Respondent had proposed a maintenance of benefits provision, Montobbio rejected that proposal and said "the company only wants to pay the current rates." Also, Montobbio requested that Casey provide information as to the current health and welfare costs. Concerning Respondent's vacation proposal, "I remember [Montobbio] saying we reject any increase in the vacation." Regarding part-time employees, according to Casey, "[Montobbio] stated that we want to leave it as it is in the contract with the change negotiated in 1997." As

to holidays, "Montobbio rejected any new holidays, saying 'we'll leave it as it is.'" Turning to paid time off, Montobbio said "We don't want any change, and we don't want any added costs. And this PTO proposal will do that." As to paid lunch, Montobbio said ". . . we don't want any change." With regard to schedules, Montobbio said they wanted ". . . the right to schedule as in the past . . ." On Respondent's lengthy successorship addendum, the Charging Party's attorney ". . . was adamant. Absolutely not." Montobbio then said he rejected Respondent's banquet gratuities proposal. Concerning Respondent's automatic gratuity proposal, Montobbio said, "we reject that and do not want any change in that." Turning to Respondent's proposed wage rates and increases, Montobbio ". . . wasn't looking to raise the wages for everybody when eventually Mr. Lolli would not be the owner of the property." As to Respondent's pension proposal, ". . . he said leave the amount the same as it is in the current agreement." Regarding the bargaining unit proposal, Montobbio ". . . said that they didn't want any change in that." At this point in the meeting, according to Casey, he asked Montobbio if he had any counterproposals, "and [Montobbio] said we'll only look at health and welfare, which contradicted what had been said earlier. And then I said, you have no counters to make He said, None. We don't want to change anything. We're going to sell the restaurant. We're willing to have a contract, but it's more important to finish the sale." He added that, if the sale was unsuccessful, ". . . then we'll be right back in court . . ." and ". . . there's no way the money is going to stay on the table." Then, the discussions turned to the pending contractual grievance over the individuals, who were not recalled when the restaurant reopened in April, and Montobbio warned that ". . . we're not going to binding arbitration, but we'll process the grievances." Then, after the parties reached an understanding as to Respondent's access to the property, Casey ". . . made it clear that we are not going to accept [the] severance package" and asked for ". . . a listing of the current workers and the wages of those workers"

Respondent's vice-president, Werlein-Jaen's version of what was said during the May 18 meeting was more concise than that of Casey. According to the former, "[the bargaining session] began with Mr. Montobbio discussing the severance package that he wanted us to consider. And he explained that . . . there was a deadline on it. And he explained that if we could not reach an agreement on it . . . it would go to court and that the money would no longer be offered because it would be used in litigation." After this, Casey said that the Union was there to negotiate a contract and that such was the reason for the meeting. He then handed Respondent's contract proposals to Montobbio, who read the document, and "[he] rejected every single one of our proposals." Asked if he indicated some followup by the Charging Party, the witness said, "when we discussed the term of the agreement . . . I think he might have made reference of . . . we'll talk about it." At this point, according to Werlein-Jaen, Respondent's representatives caucused and then returned to the meeting room. Then, the employer reiterated that they were rejecting all of our proposals. They did not have any proposals to give us. And that was the end of the session." Elaborating on the latter point and, at the same time contradicting

¹⁷ Reinaldo conceded that, if Montobbio advised the Charging Party to approve an agreement, it "probably" would be ratified.

¹⁸ According to Reinaldo, Montobbio rejected Respondent's proposals after discussing them with Reinaldo in private.

¹⁹ Reinaldo was explicit that the "goal" of meeting with Respondent ". . . was to get the severance package accepted."

²⁰ Reinaldo conceded he was not really interested in any counterproposals as "I wanted to get the severance package voted on." Further, he was unable to recall any of the circumstances of his conversation with Montobbio regarding counterproposals.

Casey, he stated that Montobbio “. . . did not say anything about counter-proposals.” Rather, “I recall him numerous times repeating we don’t want a change. We want to keep the contract the way it is.” Thereafter, upon examining his bargaining notes, Werlein-Jaen contradicted his earlier testimony, stating that a copy of Respondent’s contract proposals had been given to Montobbio at an earlier meeting and that Montobbio rejected everything but the health and welfare “question.” Finally, while on direct examination, asked by the undersigned if, after Montobbio rejected Respondent’s proposals, did Casey propose something as a collective-bargaining agreement, Werlein-Jaen responded, “No.” Then, asked if he believed a contract had been reached after bargaining that day, the witness replied, “No, they rejected every one of our proposals.”

During cross-examination, Werlein-Jaen recalled Montobbio specifically rejecting Respondent’s health and welfare proposal but then “. . . making statements about we didn’t know if it was going to increase and how much over the future.” Asked to explain why his bargaining notes have Montobbio saying the Charging Party would “take a look at” the health and welfare contributions, Werlein-Jaen contended such was not a “literal translation” of Montobbio’s comments and, in any event, he found Montobbio to have been “contradictory” during the bargaining session. Then, asked what Montobbio said about the contract term, Werlein-Jaen said Montobbio rejected Respondent’s proposal, saying “. . . something like that in the context of we want to sell the restaurant, why would we want to sign a five-year contract. The witness was not sure why he noted Montobbio said “we will look” at the term issue.

While testifying in agreement with Respondent’s vice president that, at the close of the May 18 bargaining session, he did not believe the parties had reached agreement on a collective-bargaining agreement, Michael Casey also testified that, after reviewing his bargaining notes and discussing the matter with other officials of Respondent, he concluded that the Charging Party would never present any counterproposals and, in order to ensure that an arbitrator would decide the merits of the contractual grievance over the restaurant’s failure to recall 10 individuals upon reopening, “. . . we would have to swallow a contract that didn’t include wage increases . . . [or] the pension improvements.” A short while later, according to Casey, he held a meeting with the bargaining unit employees, and, notwithstanding that Montobbio never explicitly stated a proposal for rolling over the employees’ existing terms and conditions of employment as a contract proposal, after discussing the situation, the employees voted to accept the Charging Party’s bargaining positions, as stated at the May 18 meeting, as its collective-bargaining agreement.

Asked if his analysis of the May 18 meeting was that the Charging Party had, in effect, proposed a roll-over of the expired agreement, Casey said, “No, actually my analysis was that the company didn’t want a contract. The company wanted to sell the . . . restaurant.” At the meeting, they “. . . said they were rejecting everything. Had no proposals to make, and . . . that we don’t want to change anything. That to me is a statement . . . as to what the collective-bargaining agreement would look like if they were going to have one.” While “I knew in my heart that they didn’t want to have a contract,” it was, and is,

“. . . my view that by rejecting everything, not putting any proposals out on the table, we said, fine, we’ll withdraw everything and just accept the current terms as you have said that you’re happy with keeping things as they are.”

Thereafter, on May 29, Casey sent the following letter to Montobbio. It reads:

At our last negotiating meeting, dated May 18, 2001, you rejected each of the union’s proposals related to modifications of the collective bargaining agreement. In so doing, you responded that the company wished to retain terms of the existing contract.

After consideration of the company’s position related to these issues, the union has decided to withdraw all previous proposals we have made and accept the company’s last offer, i.e. to roll-over all existing terms into a new collective-bargaining agreement.

Accordingly, enclosed are two signed Memorandums of Understanding for a new collective bargaining agreement. Please see that your client properly executes both documents and returns an original to my office.

While this resolves the contract for Castagnola’s, I remind you that in the event of a sale, the owner is still under the obligation of negotiating the effects of any such sale.

Upon reading Casey’s letter, Montobbio immediately replied in writing. His letter, dated May 30, is as follows:

I received by messenger your letter today in which you purport to accept Castagnola’s proposal for a new collective bargaining agreement. Please be advised that at no time did Castagnola’s propose a collective bargaining agreement. At our last negotiation session, Castagnola’s responded to your proposals and rejected your proposals. At that meeting there was no discussion or any agreement on any of your proposals, including the term. It is Castagnola’s intention to present a counter proposal to Local 2 which will include changes in language as well as proposed new benefits, and a severance agreement in the event of the sale of the restaurant.

If you would like to reach an agreement, I suggest you call me to schedule a meeting so that we may present Castagnola’s proposals for a new contract. I will await to hear from you.

Approximately a week later,²¹ having heard nothing from Casey about scheduling another bargaining session, Montobbio placed a telephone call to Respondent’s president. Montobbio testified, “. . . I told him I had . . . gotten his letter, and I’m sure he’d gotten mine, and I said . . . what is this? We never made any proposals to you for a contract. I said we were going to get back to you with our proposals.” According to Montobbio, Casey “disagreed” with him, and Montobbio suggested they turn to [Respondent’s] proposals. He mentioned the proposed 5-year term and said, “I told you we wouldn’t accept a five-year term and I had no proposal for a term.” Casey replied that he “understood” Montobbio as saying “the existing contract

²¹ May 31, the date, which the Charging Party gave to Respondent as a deadline for agreeing to its proposed severance package, passed, and the record is unclear as to whether the Charging Party removed it from Respondent’s consideration.

was okay. And I said, No, there were proposals you made where I said we would rather have the existing contract language. But I never proposed that we would extend the existing contract language for any period of time.” Casey reiterated that he “disagreed” with Montobbio. The latter then asked if they were going to meet, but “it was kind of left up in the air.” Casey failed to deny the occurrence of this conversation or to offer a different version of what was said by Montobbio and him.

On June 12, Montobbio sent a letter to Casey. It reads as follows:

Please advise me if you are willing to continue negotiations with Castagnola’s Restaurant over a new collective bargaining agreement.

I would appreciate hearing from you as I would like to schedule a meeting.

B. Legal Analysis

The General Counsel contends that, by refusing to meet and bargain with the Charging Party, Respondent engaged in acts and conduct violative of Section 8(b)(3) of the Act. Counsel for the General Counsel proffers no underlying theory for these allegations and, instead, essentially contests Respondent’s asserted acceptance of the Charging Party’s contract offer. Thus, noting Michael Casey’s admissions that, during the parties’ May 18 bargaining session, the Charging Party never proposed a “roll-over” collective-bargaining agreement and, immediately after the meeting, he did not believe the parties had reached agreement on a successor agreement, counsel argues that Respondent’s president was disingenuous in subsequently asserting to Mark Montobbio Respondent had accepted the Charging Party’s “last offer” to roll over all existing terms and conditions of employment into a new contract. According to counsel, as, thereafter, Respondent failed to respond to the Charging Party’s requests for continued bargaining, it violated its statutory obligation to bargain with the Charging Party. However, the Board has held that a party’s own bad faith during bargaining may preclude a finding of unlawful bad-faith bargaining by the other party (*New Brunswick General Sheet Metal Works*, 326 NLRB 915 (1998); *Louisiana Dock Co.*, 293 NLRB 233, 235–236 (1989)), and, as, in agreement with counsel for Respondent, I do not believe that the Charging Party itself ever manifested an intent to engage in good-faith collective bargaining with Respondent, I am unable to conclude that Respondent engaged in any acts and conduct violative of the Act. Finally, I also do not believe that the General Counsel may establish a violation of Section 8(b)(3) of the Act merely by challenging Respondent’s assertion of an agreement between the parties.

With regard to my belief that the Charging Party failed to manifest any intent to engage in good-faith collective bargaining with Respondent, I initially question whether, subsequent to Casey’s May 29 letter to Montobbio, the Charging Party ever actually requested Respondent to resume contract bargaining with it. Thus, by the tepid wording of his letters dated May 30 and June 12, attorney Montobbio appears to have placed a condition precedent upon the Charging Party’s willingness to continue bargaining—written notification from Casey that Respondent desired to engage in further bargaining. Lacking in either

of Montobbio’s letters is an affirmative expression of the Charging Party’s desire to engage in further bargaining or a demand that Respondent do so. In short, rather than affirmatively demanding continued negotiations, Montobbio’s language is merely suggestive of a putative defense to a refusal-to-bargain allegation by Respondent. Specifically concerning the issue of intent, the record warrants the conclusion that the Charging Party had no interest in negotiating a successor collective-bargaining agreement and was only interested in negotiating a severance agreement with Respondent. Thus, attorney Montobbio admitted that, during a telephone conversation with Casey regarding a meeting to discuss Respondent’s contract proposals, he told Casey “why waste our time” since the owner was trying to sell the restaurant and only agreed to bargain because he was legally obligated to do so. Further, Hector Reinaldo testified that, at the outset of the May 18 meeting, Montobbio specifically advised Respondent’s representatives that, rather than a collective-bargaining agreement, he was present to discuss the Charging Party’s severance package, which was the latter’s “goal” for the meeting; that Montobbio “summarily rejected” Respondent’s contract proposals; and that he (Reinaldo) would have permitted Montobbio to reach agreement upon a successor contract. Moreover, the Charging Party’s representatives were well aware that, inasmuch as all of the prospective purchaser’s existing restaurants were nonunion, it would refuse to close escrow on the purchase of Castagnola’s if the restaurant’s employees were covered by a collective-bargaining agreement. Finally, with regard to the matter of counter-proposals, I credit Casey²² that, during the May 18 meeting, after rejecting Respondent’s proposals, replying to Respondent’s president’s question as to whether he had any counterproposals to make, Montobbio replied, “none,” and, based upon the record as a whole, I believe that the Charging Party had no intent to make any counter-proposals to Respondent²³ and that Montobbio’s statements, during his telephone conversation with and in his letters to Casey that such would be forthcoming were, at worst, mendacious and, at best, cleverly designed to foreclose unfair labor practice findings against the Charging Party.

Next, in contending that Respondent unlawfully failed and refused to meet and bargain with the Charging Party, counsel for the General Counsel concentrates upon analyzing Respondent’s defense of an offer and an acceptance and, specifically, what occurred during the parties’ May 18 bargaining session. However, in arguing that Casey’s subsequent claim that he was accepting the former’s “last offer” for a successor collective-bargaining agreement was “disingenuous,” I believe that she has failed to address the appropriate legal issue. In my view, rather than its legal viability, the pertinent inquiry is whether, in his May 29 letter, Casey acted in bad faith in making his above assertion of an offer and an acceptance. Contrary to counsel, I

²² As between the two witnesses, I found Casey more credible on this point.

²³ Montobbio’s testimony was internally inconsistent with regard to whether he held discussions with his client or Reinaldo as to counterproposals, and Reinaldo specifically stated that, on behalf of the Charging Party, he was not interested in counterproposals.

believe that what Casey did was merely to asseverate a legal position to Montobbio—at best, a correct view of what had occurred and, at worst, a colorable claim of a new contract, and close scrutiny of the record discloses no evidence of underlying bad faith. In this regard, Casey was quite credible that, after analyzing his notes of the May 18 bargaining session, he understood Montobbio's rejection of each of Respondent's contract proposals, his responses that the Charging Party desired no changes from the prior contract's terms, and Montobbio's statement that he had no counter-proposals as forming the basis of a collective-bargaining agreement, one which Respondent was forced to accept in order to preserve its contractual grievance regarding the individuals, whom the Charging Party failed to recall for work after re-opening in April. Further, I note that Respondent's abandonment of its demand that the Charging Party accept a stringent successorship provision in a new collective-bargaining agreement concomitant with its asserted acceptance of the Charging Party's new contract offer appears to be redolent of good faith. Moreover, counsel for the General Counsel has cited no case citations supporting the proposition that a specious assertion of a collective-bargaining agreement alone vitiates a defense to an alleged violation of Section 8(b)(3) of the Act. In the foregoing circumstances,²⁴ I find the allegations of the instant complaint to be without merit.

²⁴ Clearly, there was no basis for the General Counsel to allege that Respondent's mistaken assertion of a contract equated to an unfair

CONCLUSION OF LAW

The General Counsel has not established that Respondent has engaged in any violations of the Act.

On these findings of fact and conclusions of law and on the entire record, I make the following recommended²⁵

ORDER

The instant complaint is dismissed in its entirety.

Dated: July 11, 2002

labor practice. Thus, in a not dissimilar context, if Respondent had alleged the Charging Party's refusal to execute the proffered collective-bargaining agreement as an unfair labor practice, at most the General Counsel would have dismissed for insufficient evidence and would not have felt compelled to find that Respondent's assertion of a contract was itself unlawful. Finally, I think what exists herein is an internecine dispute between two contractual parties one which is better left either to collective bargaining or to the political process for resolution.

²⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.